

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

DARRYL WIENKE,

No. CV 10-4082 NJV

Plaintiff,

v.

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS THE FIRST
AMENDED COMPLAINT

INDYMAC BANK FSB, ET AL.,

(Document No. 28)

Defendants.

This is a civil action arising out of the denial of a mortgage loan modification and the attempted foreclosure of real property in Kelseyville, California. Plaintiff Darryl Wienke, who is proceeding pro se, originally filed this action in the Superior Court of California, County of Lake against Defendants Indymac Bank and Indymac Mortgage Services (IMS).¹ On September 10, 2010, this action was removed to this Court by Defendant IMS. Both parties consented to jurisdiction of this Court pursuant to 28 U.S.C. § 636(c).

On March 14, 2011, the Court granted Defendant IMS' motion to dismiss the complaint with leave to amend. Doc. No. 26. Plaintiff timely filed his First Amended Complaint (FAC) and Defendant IMS now moves to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Doc. Nos. 27, 28. Plaintiff opposes the motion. The June 21, 2011 hearing on Defendant's motion was vacated by Plaintiff's request. Doc.

¹ Defendant IMS states that Indymac Bank, FSB was closed by the Office of Thrift Supervision (OTS) in 2008 and the Federal Deposit Insurance Corporation (FDIC) was appointed as receiver. *See* Def.'s Notice of Removal, 1 n.1 (Doc. No. 1); Def.'s Mot. at 1 n.1 (Doc. No. 10). After its acquisition by the FDIC, it became Indymac Federal Bank, FSB. One West Bank, FSB purchased some of the assets of Indymac Federal Bank and One West conducts some of its business under the name "IndyMac Mortgage Services." Def.'s Mot. at 1 n.1. Defendant states that IMS is not a separate entity. *Id.* Therefore, One West Bank, FSB is the correct Defendant. For purposes of this order, the Court refers to Defendant IMS as the parties have done in their briefing.

Nos. 31, 33. Having considered the papers submitted, and for good cause shown, the Court **GRANTS** Defendant's motion to dismiss and dismisses the action with prejudice.

I. JURISDICTION

The original complaint alleged violations of the Federal Truth in Lending Act (TILA) (15 U.S.C. § 1601, *et seq.*) with the TILA's corresponding Regulation Z (12 C.F.R. Part 226),² along with several state law causes of action. Therefore, when this action was initially removed to this Court pursuant to 28 U.S.C. § 1441, this Court had original federal question jurisdiction pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a). The FAC, however, does not allege any federal claims and only alleges various state law causes of action including violation of California Civil Code § 2923.5, breach of contract, breach of the implied covenant of good faith and fair dealing, and promissory estoppel.³

"The Supreme Court recently held that dismissal of federal claims does not automatically deprive district courts of subject matter jurisdiction over any supplemental claims. Rather, the district court retains discretion whether to exercise supplemental jurisdiction over state law claims even after all federal claims are dismissed." *Lacey v. Maricopa County*, --- F.3d ----, 2011 WL 2276198, *14 (9th Cir. 2011) (slip copy) (internal citations omitted); *see Carlsbad Tech., Inc. v. HIF Bio, Inc.*, --- U.S. ---, 129 S.Ct. 1862, 1866-67 (2009) ("A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary."); 28 U.S.C. § 1367(c)(3); *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 210-12 (6th Cir. 2004) (affirming district court's order denying the plaintiff's motion to remand where the federal claim was not re-alleged in the amended complaint and only state law claims remained).

Here, though federal question jurisdiction is no longer present in the FAC, the Court exercises its discretion to retain supplemental pendent jurisdiction over this action because federal question jurisdiction was present at the time the action was removed over nine months ago, the Court is familiar with the case after ruling on the first motion to dismiss, and to conserve judicial

² The complaint incorrectly refers to 24 C.F.R. §§ 3500.1-3500.17, which is Regulation X.

³ The third cause of action refers in passing to TILA and the Fair Debt Collection Practices Act, but as discussed this below, this cause of action was erroneously included in the FAC.

resources and prevent delay.⁴ *See Carlsbad Tech.*, 129 S.Ct. at 1866-67; *Lacey*, 2011 WL 2276198 at *14.

II. BACKGROUND

As appropriate on a motion to dismiss, all well-pleaded allegations in the amended complaint are assumed to be true.

Plaintiff alleges that Defendant initially approved his mortgage loan for modification, but then denied the loan modification. Plaintiff executed a promissory note for \$287,000.00 secured by a deed of trust (DOT) encumbering the real property located at 10260 Point Lakeview Road, Kelseyville, California, which was recorded on February 1, 2005. The DOT identified Plaintiff as the borrower, Indymac Bank, FSB as the beneficiary, and Meridian Trust Deed Service as the trustee. It is unclear from the complaint when Plaintiff executed the promissory note, whether and when Plaintiff received the notice of default, and when and by whom the notice of default was filed.

In or about January 2009, Plaintiff defaulted on his loan. FAC ¶ 13. In or about December 2009, Defendant offered to modify Plaintiff's mortgage. *Id.* at ¶ 15. Plaintiff "immediately" accepted the loan modification offer and provided documentation, but Defendant withdrew its offer before Plaintiff made his first payment under the modification. *Id.* Plaintiff submitted a second application for modification. In or about May 2010, Defendant approved a final loan modification plan for Plaintiff. *Id.* But in June 2010, Defendant ultimately denied the loan modification claiming that Plaintiff did not occupy the underlying property. *Id.* On or about July 16, 2010, the trustee filed a Notice of Trustee's Sale with the Lake County Recorder for a sale to occur on August 11, 2010. *Id.* at ¶ 22.

On August 10, 2010, Plaintiff filed his verified complaint for damages, injunctive relief, and declaratory relief in the Lake County Superior Court. Doc. No. 1.⁵ Plaintiff alleged that Defendant failed to adequately provide notice of the trustee sale and failed to try, with due diligence, to work with Plaintiff to avoid foreclosure. On September 10, 2010, this action was removed to this Court by Defendant IMS. On March 14, 2011, the Court granted Defendant IMS' motion to dismiss the

⁴ It is unclear from the FAC whether diversity jurisdiction is present.

⁵ The complaint refers to exhibits A through F, but these exhibits were not attached to the complaint that was filed with Defendant's notice of removal. *See* Doc. No. 1, Compl. at 2, 5, 6.

complaint with leave to amend, ruling as follows on the complaint's seven causes of action:

- 1) First Cause of Action: The California Civil Code §§ 2923.52 and 2923.54 claims were dismissed with prejudice because there is no private right of action based on these sections. The §§ 2924, 2924b, and 2923.5 claims were dismissed without prejudice for failure to state a claim upon which relief can be granted. Any claims under § 2923.5 based on Defendant's denial of the loan modification, for money damages, and for class action status were dismissed with prejudice.
- 2) Second Cause of Action: The TILA and Regulation Z claims were dismissed as barred by the statute of limitations. The claim for rescission was dismissed with prejudice. The claim for damages was dismissed without prejudice with leave to amend to add sufficient allegations of fraud, if any, to support equitable tolling of the statute of limitations.
- 3) Third Cause of Action: The California Business & Professions Code § 17200 claim for unfair competition was dismissed without prejudice for failure to state a claim upon which relief can be granted.
- 4) Fourth Cause of Action: The breach of contract claim was dismissed without prejudice for failure to state a claim upon which relief can be granted.
- 5) Fifth Cause of Action: The breach of the covenant of good faith and fair dealing claim was dismissed without prejudice for failure to state a claim upon which relief can be granted.
- 6) Sixth Cause of Action: The quiet title claim was dismissed without prejudice for failure to state a claim upon which relief can be granted.
- 7) Seventh Cause of Action: The negligent infliction of emotional distress claim was dismissed without prejudice for failure to state a claim upon which relief can be granted.

On April 14, 2011, Plaintiff timely filed his FAC alleging five causes of action: 1) violation of California Civil Code § 2923.5 based on Defendant's failure to provide notice regarding the trustee sale; 2) breach of contract (i.e., the underlying mortgage) by initiating foreclosure before contacting Plaintiff and exploring alternative options in violation of California Civil Code §§ 2923.5 and 2924; 3) breach of the implied covenant of good faith and fair dealing based on Defendant Chase's refusal to a) provide Plaintiff with a "feasible" loan modification, b) provide a response to the Qualified Written Request submitted to Defendant Chase on September 3, 2010, c) disclose documentation in violation of TILA, and d) provide an accounting pursuant to the Fair Debt Collection Practices Act; 4) breach of the implied covenant of good faith and fair dealing based on Defendant's refusal to provide Plaintiff with a "feasible" loan modification; and 5) promissory estoppel based on Defendant's promise that it would not foreclose on the subject property while it was evaluating Plaintiff's loan modification application. Plaintiff seeks compensatory, exemplary, and punitive damages; an injunction to prevent foreclosure; an injunction requiring Defendant to meet with Plaintiff in person to modify the loan; a declaration that Defendant violated state law; and

attorneys' fees.

On April 28, 2011, Defendant IMS filed the present motion to dismiss the FAC under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The foreclosure sale has not occurred yet and it remains voluntarily suspended. Doc. No. 34. The June 21, 2011 hearing on Defendant's motion was vacated by Plaintiff's request and Defendant IMS' motion was submitted on the papers. Doc. Nos. 31, 33.

III. DISCUSSION

Defendant IMS moves to dismiss the FAC under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

A. Legal Standard

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While Rule 8 "does not require 'detailed factual allegations,'" a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). Facial plausibility is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* The plausibility standard requires a complaint to plead more than "facts that are 'merely consistent with' a defendant's liability." *Id.*

In ruling on a motion to dismiss, courts may consider only "the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). When matters outside the pleadings are presented on a Rule 12(b)(6) motion and are not excluded by the court, the court must convert the Rule 12(b)(6) motion to a Rule 56 summary judgment motion. Fed. R. Civ. P. 12(d).

Dismissal under Rule 12(b)(6) is appropriate if the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Twombly*, 550 U.S. at 555. Dismissal of a complaint can be based on either the lack of a cognizable legal theory or the lack of

sufficient facts alleged under a cognizable legal theory. *Balistreri*, 901 F.2d at 699. In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

The court construes the complaint liberally because it was drafted by a pro se plaintiff. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). When granting a motion to dismiss, the court is generally required to provide pro se litigants with “an opportunity to amend the complaint to overcome deficiencies unless it is clear that they cannot be overcome by amendment.” *Eldridge v. Block*, 832 F.2d 1132, 1135-36 (9th Cir. 1987). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal “without contradicting any of the allegations of [the] original complaint.” *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. *Id.* at 296-97.

B. First Cause of Action: Wrongful Foreclosure Under the California Civil Code

Plaintiff alleges wrongful foreclosure under California Civil Code §§ 2923.5 and 2924. Subsequent statutory references in this section are to the California Civil Code.

1. Section 2923.5: Lender Contact Before Notice of Default Filed

Section 2923.5 requires, before a notice of default may be filed, that a lender contact the borrower in person or by phone to “assess” the borrower’s financial situation and “explore” options to prevent foreclosure. Cal. Civil Code § 2923.5(a)(2). The lender may not file the notice of default until 30 days after this initial contact is made or 30 days after satisfying § 2923.5(g)’s due diligence requirements. § 2923.5(a)(1). A lender satisfies the due diligence requirement if it was not able to contact the borrower after (1) sending a letter with certain information; (2) then calling the borrower “by telephone at least three times at different hours and on different days”; (3) if the borrower does not respond within two weeks after the telephone calls, sending a certified letter, with return receipt

1 requested; (4) providing a toll-free telephone number that will provide access to a live representative
2 during business hours; and (5) posting a prominent link on the lender's homepage with certain
3 information. § 2923.5(g).

4 California courts have recognized a private right of action under § 2923.5 and have held that
5 this right is not preempted by federal law. *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 214,
6 225-30 (2010). The only available remedy under § 2923.5, however, is a postponement of the
7 foreclosure sale for the lender to cure the deficiencies in its compliance with § 2923.5. *See id.* at
8 214, 231-32; *see also Aguilera v. Hilltop Lending Corp.*, 2010 WL 3340566, *4 (N.D. Cal. 2010)
9 (slip copy) (citing *Mabry*, 185 Cal. App. 4th 208).

10 Here, the FAC indicates that the foreclosure sale on the underlying property has not yet been
11 held, which is one of the requirements for bringing a § 2923.5 claim. *See* FAC ¶¶ 15, 22; *see also*
12 Doc. No. 34.⁶ As the *Mabry* court made clear: "There is nothing in section 2923.5 that requires the
13 lender to rewrite or modify the loan." *Mabry*, 185 Cal. App. 4th at 214. Because the only available
14 remedy under section 2923.5 is a postponement of the foreclosure sale, damages are not available.
15 In addition, the FAC does not allege that a foreclosure sale is even pending, so the request for
16 injunctive relief is not ripe.

17 Also, though the FAC added allegations identifying when Plaintiff defaulted on his
18 mortgage, clarifying that Plaintiff spoke with a representative from Defendant lender by telephone,
19 and that Plaintiff initiated the contact with Defendant, the FAC remains silent or unclear as to
20 whether and when Plaintiff received the notice of default; when and by whom the notice of default
21 was filed; and whether Defendant complied with § 2923.5(g)'s due diligence requirements.

22 In conclusion, Plaintiff's § 2923.5 claim is dismissed with prejudice for failure to state a
23 claim upon which relief can be granted.

24 2. Section 2924: Notice

25 The FAC also refers in passing to California Civil Code § 2924. FAC. ¶¶ 33, 34. Section
26 2924 requires that a trustee must notify an owner or borrower before a foreclosure sale may proceed.

27
28 ⁶ As of June 27, 2011, the foreclosure sale remains voluntarily suspended and there is no sale
currently scheduled. Doc. No. 34

1 When attacking a non-judicial foreclosure sale, a borrower must overcome a presumption of
 2 propriety. *Knapp v. Doherty*, 123 Cal. App. 4th 76, 86 n. 4 (2004). A borrower may overcome the
 3 presumption by proving an improper procedure occurred and by demonstrating resulting prejudice.
 4 *Id.* Here, the FAC does not cure the defects previously identified by the Court in dismissing the
 5 § 2924 claim in the original complaint, including addressing whether and when Plaintiff received the
 6 notice of default; when and by whom the notice of default was filed; and the resulting prejudice to
 7 Plaintiff from the failure to comply with § 2924. *See* FAC ¶ 22. Therefore, Plaintiff's claims
 8 challenging notice based on § 2924 are dismissed with prejudice for failure to state a claim upon
 9 which relief can be granted.

10 **C. Second Cause of Action: Breach of Contract**

11 In his second cause of action, Plaintiff alleges breach of contract of the original deed of trust
 12 agreement between Plaintiff and Defendant. Plaintiff contends that Defendant breached the contract
 13 when it initiated foreclosure proceedings on the property prior to attempting to contact Plaintiff to
 14 discuss, in good faith, Plaintiff's financial condition and to explore options to avoid foreclosure.
 15 Though the FAC adds additional detail to this cause of action regarding wrongful foreclosure,
 16 Plaintiff's breach of contract claim is still based on Defendant's alleged violation of California Civil
 17 Code §§ 2923.5 and 2924. Because Plaintiff has failed to sufficiently plead wrongful foreclosure
 18 based on sections 2923.5 and 2924 as described above, the Court dismisses the breach of contract
 19 cause of action with prejudice.

20 **D. Third Cause of Action: Breach of the Implied Covenant of Good Faith and Fair**
 21 **Dealing (Against Chase)**

22 In his third cause of action, Plaintiff alleges that Defendant Chase breached the implied
 23 covenant of good faith and fair dealing based on Defendant Chase's refusal to a) provide "Plaintiffs"
 24 with a "feasible" loan modification; b) provide a response to the Qualified Written Request
 25 submitted to Defendant Chase on September 3, 2010; c) disclose documentation in violation of
 26 TILA; and d) provide an accounting pursuant to the Fair Debt Collection Practices Act. Chase is
 27 not, however, a defendant in this action nor is Chase mentioned anywhere else in the FAC. This
 28 cause of action also refers to "Plaintiffs," but in this case, Plaintiff Darryl Wienke is the sole

plaintiff. This cause of action appears to have been erroneously included in the FAC and refers to a separate, unrelated lawsuit. Therefore, the Court dismisses the third cause of action with prejudice.

E. Fourth Cause of Action: Breach of the Implied Covenant of Good Faith and Fair Dealing (Loan Modification Refusal)

In his fourth cause of action, Plaintiff alleges that Defendant breached the implied covenant of good faith and fair dealing, citing California Civil Code §§ 2923 and 2923.6, and current practices of the mortgage industry. This cause of action is identical to the fifth cause of action in the original complaint, which the Court dismissed without prejudice after identifying the claim's defects. Though the FAC does identify when Plaintiff defaulted on his loan (FAC ¶ 13), the FAC fails to cure the other defects previously identified by the Court including describing the terms of Plaintiff's loan agreement and pleading allegations of fraud with particularity. Therefore, the Court dismisses the fourth cause of action with prejudice.

F. Fifth Cause of Action: Promissory Estoppel

In his fifth cause of action, Plaintiff brings a claim for promissory estoppel against all Defendants. Plaintiff alleges that Defendant IMS made a promise to him in clear and unambiguous language that it would not foreclose on the subject property while it was evaluating his modification application. Plaintiff claims that he relied on this promise, that such reliance was reasonable, and that he was injured by his reliance.

This cause of action suffers from an insurmountable defect. By Plaintiff's own account, at the time that Defendant IMS denied the loan modification in June 2010, it had not yet foreclosed on the subject property, which was originally noticed for a trustee sale on August 11, 2010. FAC ¶¶ 15, 22. The FAC does not allege that a foreclosure sale ever occurred. Indeed, Defendant IMS has confirmed that the sale of the underlying property remains voluntarily suspended and that a sale is not currently scheduled. Doc. No. 34. Consequently, Defendant IMS could not have broken a promise, if such a promise was made, that it would not foreclose on the subject property while it was evaluating the loan modification application. Likewise, Plaintiff could not have been injured, when no promise was broken. Because the basic premise of the promissory estoppel claim is contradicted elsewhere in the FAC, the fifth cause of action does not state a claim on which relief can be granted. Therefore, the Court dismisses this cause of action with prejudice.

IV. CONCLUSION

For the reasons described above, the Court **GRANTS** Defendant's motion to dismiss and **dismisses this action with prejudice** as follows:

- 1) **First Cause of Action:** The California Civil Code §§ 2923.5 and 2924 claims for wrongful foreclosure are dismissed with prejudice for failure to state a claim upon which relief can be granted.
- 2) **Second Cause of Action:** The breach of contract claim is dismissed with prejudice for failure to state a claim upon which relief can be granted.
- 3) **Third Cause of Action:** The breach of the covenant of good faith and fair dealing claim against Chase is dismissed with prejudice for failure to state a claim upon which relief can be granted. Chase is not a defendant in this case and this cause of action was erroneously included in the FAC.
- 4) **Fourth Cause of Action:** The breach of the covenant of good faith and fair dealing claim based on the refusal of a loan modification is dismissed with prejudice for failure to state a claim upon which relief can be granted.
- 5) **Fifth Cause of Action:** The promissory estoppel claim is dismissed with prejudice for failure to state a claim upon which relief can be granted.

The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: June 29, 2011



NANDOR J. VADAS
United States Magistrate Judge